

Prairie Tank Southern, Inc. and International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers, AFL-CIO.
Case 10-CA-17432

May 12, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND
ZIMMERMAN

Upon a charge filed on September 15, 1981, by International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO, herein called the Union, and duly served on Prairie Tank Southern, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Acting Regional Director for Region 10, issued a complaint on October 20, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on July 21, 1981, following a Board election in Case 10-RC-12322, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;¹ and that, commencing on or about July 27, 1981, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so, and also has refused, and continues to date to refuse, to bargain collectively with the Union by providing requested bargaining information. On October 28, 1981, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On February 2, 1982, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on February 4, 1982, the Board issued an order transferring the

proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a Cross-Motion for Summary Judgment and brief in support thereof and in opposition to the General Counsel's Motion for Summary Judgment.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and in its Cross-Motion for Summary Judgment, Respondent admits that it has refused to bargain with the Union or to provide it with requested information, but denies that it has thereby violated the Act and asserts as affirmative defenses: (1) that the Board improperly failed to sustain Respondent's objections to the election; (2) that the Board improperly denied Respondent a hearing on its objections; and (3) that the Regional Director improperly failed to transmit to the Board the complete record in the representation proceeding. Counsel for the General Counsel argues that there are no matters warranting a hearing because the issues concerning the Union's certification were litigated and determined in the underlying representation case. We agree with counsel for the General Counsel.

A review of the record herein, including that of the representation proceeding in Case 10-RC-12322, shows that on March 27, 1981, an election was held pursuant to a Stipulation for Certification Upon Consent Election in which a majority of the employees in the stipulated unit of production and maintenance employees designated the Union as their representative for the purposes of collective bargaining. Thereafter, Respondent filed timely objections to the election alleging that the Union (1) threatened employees who opposed the Union that they would lose their jobs when the Union came in, and (2) threatened employees who opposed the Union that they would be adversely affected and/or not represented fairly by the Union when the Union came in. On April 28, 1981, after investigation of Respondent's objections, the Acting Regional Director issued a Report on Objections in which he recommended overruling the objections and certifying the Union. Thereafter, Respondent filed with the Board its exceptions to the Acting Regional Director's Report on Objections, essentially reiterating the allegations and contentions set forth in its objections and citing additional authori-

¹ Official notice is taken of the record in the representation proceeding, Case 10-RC-12322, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enf'd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enf'd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enf'd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

ty in support thereof. On July 21, 1981, the Board issued its Decision and Certification of Representative² in which it adopted the Acting Regional Director's findings and recommendations and certified the Union as the exclusive bargaining representative of the employees in the appropriate unit.

By letter dated July 27, 1981, the Union requested Respondent to bargain with it collectively as the collective-bargaining representative of the employees. The Union also requested, by letters dated July 27 and September 4, 1981, that Respondent supply it with information necessary for collective bargaining, including employees' names, wage rates, classifications, dates of hire, and social security numbers, and details of current fringe benefits. Respondent, since July 27, 1981, and at all times thereafter, including by letter on August 10, 1981, has refused and is continuing to refuse to bargain collectively with the Union as the exclusive bargaining representative of the unit employees and to supply the Union with the requested information.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.³

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding,⁴ and Respondent does

not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the General Counsel's Motion for Summary Judgment and deny Respondent's Cross-Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, an Alabama corporation with an office and place of business in Pell City, Alabama, is engaged in the modification and repair of steel tanks. In the past year, it purchased and received at its Pell City facility supplies valued in excess of \$50,000 directly from points outside the State of Alabama.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. The Representation Proceeding

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

All production and maintenance employees, employed by the Employer at its Pell City, Alabama, facility, including truck drivers, but excluding all office employees, professional employees, guards and supervisors as defined in the Act.

² Not reported in bound volumes of Board Decisions.

³ See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

⁴ Respondent in its brief in support of the Cross-Motion for Summary Judgment argues for the first time that the Regional Director improperly failed to transmit the complete record to the Board in the earlier representation case. In this regard, Respondent appears to argue that its failure to raise this issue earlier is justified by the Region's refusal in the instant case to enter into a stipulation to the effect that affidavits taken in the course of the Region's investigation of the representation case were not forwarded to the Board. We find no merit to this argument. The Region's refusal to enter into a stipulation does not excuse Respondent from failing to timely raise in the representation proceeding the issue of the Region's failure to transmit affidavits to the Board. Respondent does not claim lack of familiarity with Sec. 102.69 of the Board's Rules and Regulations, Series 8, as amended, regarding the procedures for filing exceptions to a regional director's report, or what constitutes the record thereunder. Indeed the whole tenor of Respondent's argument is to the contrary. Further, Respondent had notice of what was forwarded to the Board in the representation proceeding as the Acting Regional Director's Report on Objections in effect described what the record would consist of before the Board. Finally, there is no requirement that regional directors in their capacity as representatives of the Board enter into any such stipulations, nor is there any valid basis for arguing that their failure to do so constitutes an abuse of their discretionary power or prejudicial error. Accordingly, we conclude that Respondent's failure to raise this issue in the representation proceeding constitutes a waiver precluding it from raising this issue as a defense to its refusal to bargain with the Union. *F. A. Bartlett Tree Expert Co.*, 258 NLRB No. 100 (1981) [vacated by Order dated May 11, 1982]. See also *Fall River Savings Bank*, 250 NLRB 935, 936, fn. 12 (1980), *enfd.* 649 F.2d 50, 57-61 (1st Cir. 1981); and *St. Anthony Hospital Systems*, 252 NLRB 50 (1980), *enfd.* as to this issue 655 F.2d 1028 (10th Cir. 1981). Moreover, since none of Respondent's objections raise substantial or material factual issues, no evidentiary hearing is warranted. See Sec. 102.69 of the Board's Rules and Regula-

tions; *Reichart Furniture Company v. N.L.R.B.*, 649 F.2d 397 (6th Cir. 1981); and *Revco D.S., Inc. and/or White Cross Stores, Inc.*, No. 14 v. *N.L.R.B.*, 653 F.2d 264 (6th Cir. 1981).

2. The certification

On March 27, 1981, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 10, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on July 21, 1981, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about July 27, 1981, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit, and has requested Respondent to provide it with unit employees' names, wage rates, classifications, dates of hire, and social security numbers, and details of current fringe benefits. Commencing on or about July 27, 1981, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit, and has refused to furnish the Union with the requested information which is relevant to collective bargaining.

Accordingly, we find that Respondent has, since July 27, 1981, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and has refused to supply relevant bargaining information requested by the Union, and that, by such refusals, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we

shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement. We shall also order that Respondent, upon request, furnish the Union with the information it requested on July 27 and September 4, 1981.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Prairie Tank Southern, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees employed by the Respondent at its Pell City, Alabama, facility, including truck drivers, but excluding all office employees, professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since July 21, 1981, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about July 27, 1981, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By refusing since on or about July 27, 1981, to supply information requested by the Union regard-

ing the employees' names, wage rates, classifications, dates of hire, and social security numbers, and details of current fringe benefits, which is necessary for collective bargaining, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

7. By the aforesaid refusal to bargain and refusal to supply requested information, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Prairie Tank Southern, Inc., Pell City, Alabama, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

All production and maintenance employees, employed by the Employer at its Pell City, Alabama, facility, including truck drivers, but excluding all office employees, professional employees, guards and supervisors as defined in the Act.

(b) Refusing to supply the aforesaid labor organization with requested information necessary for collective bargaining, including employees' names, wage rates, classifications, dates of hire, and social security numbers, and details of current fringe benefits.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if

an understanding is reached, embody such understanding in a signed agreement.

(b) Upon request, supply the above-named labor organization with information previously requested by it which is necessary for collective bargaining, including employees' names, wage rates, classifications, dates of hire, and social security numbers, and details of current fringe benefits.

(c) Post at its Pell City, Alabama, facilities copies of the attached notice marked "Appendix."⁵ Copies of said notice, on forms provided by the Regional Director for Region 10, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 10, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

⁵ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT refuse to bargain collectively with the above-named Union by refusing to furnish it with the information which it has requested with respect to the present terms and conditions of employees in the unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All production and maintenance employees, employed by the Employer at its Pell City, Alabama, facility, including truck drivers, but excluding all office employees, profes-

sional employees, guards and supervisors as defined in the Act.

WE WILL, upon request, supply the above-named Union with information previously requested by it which is necessary for collective bargaining, including employees' names, wage rates, classifications, dates of hire, and social security numbers, and details of current fringe benefits.

PRAIRIE TANK SOUTHERN, INC.